SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1920

Original No. 24

Ex Parte: In the Matter of the Chicago, Rock Island and Pacific Railway Company, Petitioner.

REPLY BRIEF.

Lawrence Maxwell,
William L. Day,
Joseph S. Graydon,
Counsel for Petitioner.

THE BARCLAY PRINTING COMPANY, 1018-1020 Elm Street, Cincinnati, O.

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REPLY BRIEF.

We attach copies of the following orders and motion referred to in the return, but not fully set out therein, to-wit: order of March 1, 1918 (p. 9), and the motion referred to in said order (p. 10); order of March 11, 1918 (p. 11); order of November 13, 1919 (p. 13); so much of the order of October 22, 1914, appointing a receiver as relates to presentation of claims of creditors (p. 14).

The notice set out at p. 15 of the return was addressed as therein alleged; it was signed "Tracy, Chapman & Welles, Solicitors for parties filing the above pleadings."

The answer of the Rock Island Company to the cross bill filed as alleged at p. 20 of the return, commences as follows:

"The Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under the laws of Illinois and Iowa, having its office and princi-

pal place of business in Chicago, Illinois, not intending to waive, but insisting upon and renewing its claims, that it is not a party to this suit and has not entered its appearance as a party, and that the court is without jurisdiction over it as a defendant to the so-called cross bill of the Toledo, St. Louis & Western Railroad Company, filed herein on March 1, 1918, or at all, and especially in respect of the pretended cause of action therein set up for the recovery of moneys from it, and that it is not suable in this suit upon said pretended cause of action, neither it nor the cross complainant being a resident or inhabitant of this District; files this answer to said cross bill in pursuance of the orders of the court and under protest in order to avoid judgment against it by default."

I.

For brevity we call the Chicago, Rock Island & Pacific Railway Company the Rock Island Company, and the Toledo, St. Louis & Western Railroad Company the Toledo Company.

Whatever hearing was had of the motion of the Toledo Company, for leave to file a cross bill against the Rock Island Company, was ex parte. It is not alleged that the Rock Island Company had notice of the hearing or that it was present. The order that was entered (post p. 9) recites who were present. The motion (p. 10) does not even suggest that the cross bill proposed to be filed was a cross bill against the

Rock Island Company, nor does the order that was entered indicate that any pleading allowed to be filed was a cross bill against the Rock Island Company.

The finding in the order of March 11, 1918 (post p. 12), that the Rock Island Company "has heretofore entered its appearance as a party to this suit" is ex parte. It is not alleged in the return that the Rock Island Company had notice of the hearing, or that it was present. The so-called "notice" mentioned in the order, and set out at p. 15 of the return, was an unofficial ex post facto notice, received at Cincinnati on March 9, 1918, from counsel for the Toledo Company, that seven pleadings therein mentioned had been filed by leave of court on March 1, 1918. It is not suggested in the "notice" that any pleading was a cross bill against the Rock Island Company, or that further orders would be applied for, or that a copy of the order was enclosed.

II.

The allegation on p. 14 of the return that "evidence was introduced" on the hearing of the motion for leave to file the cross bill, is not in accord with the order that was entered (post p. 9).

It is not alleged (p. 16 of return) that evidence was introduced on March 11, 1918, but only that "the court considered further the evidence which had been introduced," evidently referring to March 1, 1918. This is not in accord with the order that was entered

(post p. 11), which recites only that proof was made of service on Mr. Maxwell of the so-called "notice."

The allegation on p. 18 of the return, that the motion appearing on p. 11 of the petition was heard on evidence, is not indicated in the order that was entered (post p. 13), nor in the opinion that was filed (p. 19 of the petition). That opinion clearly shows that the ground of decision was that the Rock Island Company had "caused itself to be so represented in the taking of testimony in this case as to have made itself a party to the record."

In re Veler in the Circuit Court of Appeals for the Sixth circuit, 249Fed.633, is a case in which the District Court had appointed a receiver, and sometime after the receivership was closed had on its own motion instituted an inquiry in open court, summoned witnesses and announced the conclusion that there had been no jurisdiction, and that the District Judge had been "grossly misled into the appointment of a receiver." He thereupon found that the original petitioning creditors were liable for the debts of the receiver and costs of the receivership. The decision of the Circuit Court of Appeals reversing the judgment is shown at page 644, and is indicated in the thirteenth syllabus:

> "In view of the imperfections of the human memory, a statement or certificate of the District Judge with respect to the appointment of a receiver, which it was asserted was secured through imposition on the court, does not, where made in a summary proceeding in which no

issues to determine the liability of the petitioning creditors were framed, import verity, as would a record of judicial proceedings required to be certified by the court."

III.

It is a fundamental rule that in order to obtain jurisdiction

> "service of process or the prescribed legal or statutory notice is always a prerequisite to jurisdiction over either the person or property, and this statutory mode of service or of giving notice, must be followed, including requirements as to time, or the return. Nor does a person's knowledge of the existence of an action, no matter how clearly brought home to him, supply the want of compliance with the statutory or legal requirements, and so even though the party is in the court's presence unless he is brought there by legal means. Service of process out of the territorial jurisdiction of the court from which it issues, at common law is a nullity, for process of court has no force outside of its jurisdiction" (11 Cyc. 671, title 'Courts' citing numerous cases).

The fundamental principles are set forth in the opinion of Mr. Justice Field in the leading case of Pennoyer vs. Neff, 95 U. S. 714.

In Pacific Railroad vs. Missouri Pacific Railway Co., 1 McCrary 647 (also reported at 3 Fed. 772), the court had entered a decree of foreclosure and sale on a mortgage of the Missouri Pacific Railroad. Thereafter

a bill was filed in the same suit to set aside the sale, making purchasers at the sale, and others who were not parties to the original suit, parties defendant. Subpoenaes were issued and served outside the jurisdiction and on a motion to vacate such service Mr. Justice Miller, upon consideration of sections 738 and 739 of the Revised Statutes, granted the motion, saying:

> "The argument, by which it is endeavored to support the service of process upon persons without the district, is that the present suit is one that is auxiliary to the former suit in which the decree of foreclosure was had; that it is so far merely a continuation of that suit; and that it is not a new and original suit in the sense that requires process to be restricted to those who have the requisite citizenship in ordinary suits in the federal courts. It may be conceded for the purposes of this motion that it is to a certain extent auxiliary to the original foreclosure suit, and that proceedings to set aside that decree, and to set aside also the sale of the railroad under that decree, can only be instituted in the circuit court of the United States in which that decree was rendered. But it also partakes so far of the nature of an original suit that the parties who are here contesting service of this process cannot be brought before the court by anything short of a subpoena in chancery; and cannot be compelled to answer and respond to the allegations of the present bill in any other mode than in the mode usually adopted in original chancery bills."

The rule was enforced and substituted service on bills filed as ancillary but making new parties, set aside, in Rubber Co. vs. Goodyear, 9 Wall. 807, 810, and Shainwald vs. Davids, 69 Fed. 701. See also Manning vs. Berdan, 132 Fed. 382, and Smith vs. Woolfolk, 115 U. S. 143.

In in re Cooper, 143 U. S. 472, cited at p. 31 of respondent's brief, it clearly appears at p. 478 that the defendant was duly served with process, filed a demurrer to the libel by leave of court, and upon its being overruled, filed an answer and proceeded to trial.

Equity rules 30 and 31, relied upon by respondent, are equally irrelevant. They provide for a decree pro confesso, in default of reply to a counter-claim or set-off against the plaintiff set up by the defendant in his answer to the bill.

IV.

The decision of District Judge Westenhaver in VanKannel Revolving Door Co. vs. Winton Hotel Co. 263 Fed. 988, is indicated by the fourth syllabus:

> "A corporation, employing counsel appearing for defendant in a patent infringement suit, and conducting the defense at its own cost and expense, is a privy to any judgment rendered, and bound thereby, but was not required to become a party to the record."

The decision of the Circuit Court of Appeals, Third Circuit, in Bergdoll vs. Harrigan, 263 Fed. 279, is indicated by the third syllabus:

"Appearance of a stockholder of a bankrupt corporation to contest a petition by the trustee asking that an assessment be made on all stock not fully paid for held not to confer jurisdiction on the bankruptcy court to adjudicate his personal liability for such an assessment."

The above cases but apply the rule involved in Merriam vs. Saalfield, 241 U. S. 22, and other cases cited at p. 5 of our original brief.

It is shown by cases in this court, cited at pages 5 and 6 of our original brief, and is conceded at pages 7 and 9 of respondent's brief, that a writ of mandamus is the appropriate remedy if petitioner is entitled to relief.

We submit that the return shows no cause, and that a writ of mandamus should be awarded as prayed

Lawrence Maxwell,
William L. Day,
Joseph S. Graydon,
Counsel for Petitioner.

APPENDIX.

Order Entered March 1, 1918.

This day came Thos. H. Tracy and George D. Welles of Tracy, Chapman & Welles, of counsel for the parties filing the motions hereinafter described, E. J. Marshall of Marshall & Fraser, of counsel for Edwin G. Merrill, et al., as a bondholders' committee, and William B. Stewart, of Hoyt, Dustin, Kelley, McKechan & Andrews of counsel for Central Trust Company of New York as Trustee, and thereupon came on for hearing the respetive motions of the Toledo, St. Louis & Western Railroad Company for leave to file an answer to the cross bill of Central Trust Company of New York as Trustee, and of Toledo, St. Louis & Western Railroad Company for leave to file an answer and cross bill to the answer and cross bill of Edwin G. Merrill, et al., as a bondholders' committee, and the motions of Jules S. Bache, et al., as a stockholders' committee for leave to file an amendment to its answer to the cross bill of Central Trust Company of New York as Trustee, and of Jules S. Bache, et al., as a stockholders' committee for leave to file an amendment to its answer to the answer and cross bill of Edwin G. Merrill, et al., as a bondholders' committee, and its cross bill and the motions of The Western Union Telegraph Company for leave to file an amendment to its answer to the cross bill of Central Trust Co. of New York as Trustee, and of The Western Union Telegraph Co. for leave to file an amendment to its answer to the answer and cross bill

of Edwin G. Merrill, et al., as a bondholders' committee, and the motion of Horatio C. Creith to file an amendment to the bill of complaint, and said motions, together with the pleadings therein referred to were submitted to the court, and the court being fully advised in the premises finds that said motions and each of them should be, and the same are hereby granted, and the pleadings therein referred to are accordingly allowed to be filed; to the foregoing order Central Trust Company of New York as Trustee, and Edwin G. Merrill, et al., as a bondholders' committee thereupon, by their counsel, duly excepted.

John M. Killits,
Judge.

Motion referred to in Order of March 1, 1918.

Motion of Toledo, St. Louis & Western Railroad Company for Leave to File an Answer to the Answer and Cross Bill of Edwin G. Merrill, et al.

Now comes the Toledo, St. Louis & Western Railroad Company and moves the court for leave to file an answer herein to the answer and cross bill of Edwin G. Merrill, et al., and its cross bill, and which answer and cross bill it will tender upon the hearing hereof.

Tracy, Chapman & Welles,
Solicitors for Toledo, St. Louis
& Western Railroad Company.

Order of March 11, 1918.

On this 11th day of March, 1918, came Thos. H. Tracy, of Tracy, Chapman & Welles, of solicitors in this suit for Horatio C. Creith, Jules S. Bache, et al., as a stockholders' committee, The Western Union Telegraph Company, and Toledo, St. Louis & Western Railroad Company, and filed in this suit, copy of notice to Chicago, Rock Island & Pacific Railway Company, Lawrence Maxwell, Solicitor, and made due proof that the original of said notice, together with duly certified copies of amendment to bill of complaint, amendment to answer of Jules S. Bache, et al., to the answer and cross bill of Edwin G. Merrill, et al., amendment to the answer of Jules S. Bache, et al., to the cross bill of Central Trust Company of New York as Trustee, amendment to the answer of The Western Union Telegraph Company to the answer and cross bill of Edwin G. Merrill, et al., amendment to the answer of The Western Union Telegraph Company to the cross bill of Central Trust Company of New York as Trustee, answer of Toledo, St. Louis & Western Railroad Company to the answer and cross bill of Edwin G. Merrill, et al., and cross bill of Toledo, St. Louis & Western Railroad Company, and answer of Toledo, St. Louis & Western Railroad Company to the cross bill of Central Trust Company of New York, as Trustee, the originals of which pleadings were filed in this suit on the 1st day of March, 1918, were duly delivered to and served upon Lawrence Maxwell, Solicitor for Chicago, Rock

Island & Pacific Railway Company in this suit on the 9th day of March, 1918, and;

It is accordingly ordered that the Chicago, Rock Island & Pacific Railway Company, which, the court finds, has heretofore entered its appearance as a party to this suit, be accorded and allowed ten days from the date of the entry hereof within which it is required to reply to the said cross bill of Toledo, St. Louis & Western Railroad Company, and to such, if any, of the other above enumerated pleadings as said Chicago, Rock Island & Pacific Railway Company may desire to reply, and in default of such reply a decree pro confesso against The Chicago, Rock Island & Pacific Railway Company may be entered on said cross bill of Toledo, St. Louis & Western Railway Company, and upon the other above enumerated pleadings as in default, etc., and the clerk of this court is hereby directed to forthwith mail a duly certified copy hereof to Lawrence Maxwell, Esq., Solicitor for Chicago, Rock Island & Pacific Railway Company, No. 2208 Union Central Building, Cincinnati, Ohio.

John M. Killits, Judge.

Order Entered November 13, 1919.

This cause came on to be heard upon the motion of the Chicago, Rock Island & Pacific Railway Company filed herein on March 20, 1918, to set aside the finding and order of the court entered March 11, 1918; on consideration whereof said motion is overruled, to which the Chicago, Rock Island & Pacific Railway Company excepts, and said Chicago, Rock Island & Pacific Railway Company, within 20 days from the date of the entry hereof, is required to plead to said cross bill of Toledo, St. Louis & Western Railroad Company and to such if any of the other pleadings enumerated in said order of March 11, 1918, to-wit: The amendment to the bill of complaint; The amendment to the answer of The Western Union Telegraph Company to the cross bill of Central Trust Company of New York, as Trustee; The amendment to the answer of Jules S. Bache, et al., to the cross bill of Central Trust Company of New York, Trustee; The amendment to the answer of Jules S. Bache, et al., to the answer and cross bill of Edwin G. Morrill, et al.; The answer of Toledo, St. Louis & Western Railroad Company to the answer and cross bill of Edwin G. Merrill, et al., and cross bill of Toledo, St. Louis & Western Railroad Company, the answer of Toledo, St. Louis & Western R. R. Co. to the cross bill of Central Trust Company of New York, as Trustee; as said Chicago, Rock Island & Pacific Railway Company may desire to plead to, and in default thereof a decree pro confesso against Chicago, Rock Island & Pacific

Railway Company may be entered upon said cross bill of said Toledo, St. Louis & Western Railroad Company and upon the other above enumerated pleadings as in default. The Chicago, Rock Island & Pacific Railway Company excepts to said order upon the grounds that the court is without jurisdiction to make the same or to require it to plead to said pleadings or any of them, and because it is not a resident of the state of Ohio.

Provisions of Order of October 22, 1914, appointing receiver, relating to claims of creditors.

"Said receiver shall publish notice to the creditors of the defendant that said creditors shall, within sixty (60) days from the first publication of said notice, present their respective claims to him duly verified, or that they file herein a bill of intervention, and said master shall hear and receive such evidence as may be offered for and against the validity of any and all such claims and interventions, and shall determine and submit to the court his conclusions thereon. The receiver, the defendant, or any creditor or stockholder thereof, shall be permitted to plead to and contest the amount, validity and priority of any and all such claims. The receiver shall cause said notice to be published in a daily newspaper, published and of general circulation in each of the following cities, viz: the city of Toledo, Ohio; the city of Frankfort, Indiana; the city of St. Louis, Missouri; the city of Springfield, Illinois, and

the city of New York, New York. Such publication shall be made in each of said newspapers on each weekday for three successive weeks, and the receiver shall file herein due proof of such publications; and all creditors of the defendant, excepting those hereinafter named, failing to file with said receiver duly verified copies of their respective claims or bills of intervention herein, setting up their respective claims within sixty (60) days from the date of the first publication of such notice, shall be barred, and such creditors so failing to file verified copies of their respective claims or bills of intervention setting forth their respective claims, within the time aforesaid, shall not be permitted or allowed to participate or receive any payments upon their respective claims, either from the income of the property of the defendant, or from the proceeds of the sale thereof.

It is further ordered that the foregoing provisions of this order as to filing verified copies of claims or bills of intervention thereon shall not apply to creditors holding claims upon which the receiver is hereinbefore ordered to pay the interest, and creditors whose claims have arisen on account of services, labor, material or supplies furnished to the defendant, and which said accounts and claims shall, after investigation, be approved for payment by the receiver, and included within the list of creditors to be furnished by the receiver to the master, as hereinabove provided.

After the expiration of said sixty days, the master

shall proceed, without unnecessary delay, to hear and determine all questions as to the amount, validity, and priority of each and all of such claims, and shall make his report thereof to this court, in accordance with this order, within thirty (30) days after the expiration of said sixty (60) days, unless, upon application of the master to this court, further time is granted.

(Signed) John M. Killits, Judge.

Entered October 22, 1914."

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1920.

No. 24 Original.

In re Chicago, Rock Island & Pacific Railway Company, Petitioner.

MOTION OF PETITIONER FOR REHEARING.

On page 1 of the opinion the court, in stating the case, says; "The suit in which it is sought to proceed personally against the Rock Island is one brought by an Indiana stockholder of the Toledo, St. Louis & Western Railroad Company, an Ohio corporation, for the appointment of a receiver for that corporation." The fact, as distinctly alleged at page 1 of the petition for the writ, and not denied in the return, is that the plaintiff was a creditor (not a stockholder); that he was a citizen of Ohio (not of Indiana), and that the defendant was an Indiana corporation (not an Ohio corporation). The discrepancy may not be material or significant, except as suggesting that other and more important parts of the record may have been overlooked, or misunderstood.

But we beg leave to first call the attention of the Court to the authorities cited at page 2 of the opinion from which the Court deduces a "rule," tested by

which, it holds that "the case presented by the petition and the return does not entitle the Rock Island to this extraordinary remedy."

Ex parte Rice, 155 U. S. 396, the first of the cases, is cited to the proposition that "if the lower court is clearly without jurisdiction the writ will ordinarily be granted to one who at the outset objected to the jurisdiction and who has reserved his rights by appropriate procedure and has no other remedy;" but it seems to have no bearing on that proposition. It is a case in which this court refused leave to file a petition for a writ of prohibition or mandamus to review a judgment of a Circuit Court in a suit in which the jurisdiction of the Court over the parties or the subject matter was not involved. It was an attempt to review a judgment of a Circuit Court, not because the Court was without jurisdiction of the parties or the subject matter, but on the ground that its judgment was erroneous.

In in re Cooper, 143 U. S. 476, 482, next cited, it clearly appears at p. 478 that the defendant was duly served with process, filed a demurrer to the libel by leave of Court, and upon its being overruled, filed an answer and proceeded to trial.

Ex parte Tiffany, 252 U. S. 32, 37, was an attempt to review by writ of mandamus or prohibition a final judgment in a proceeding in a District Court of the United States, which the petitioner had himself instituted. No question of the jurisdiction of the lower Court over the subject matter or the parties was involved. Moreover, the judgment was one which could

be reviewed, as of right, by an appeal to the Circuit Court of Appeals.

The next case, Ex parte Harding, petitioner, 219 U. S. 363, is one of the many removal cases cited in the opinion. They were all attempts to review, by mandamus, judgments remanding, or refusing to remand, cases removed from a State Court. None involve any question as to the jurisdiction of the Circuit or District Court over the person of the parties, but only their jurisdiction of the subject matter; and that question was finally resolved and settled by applying to removal cases "the general rule that a Court, having jurisdiction over the subject-matter and the parties, is competent to decide questions arising as to its jurisdiction." We shall not notice further the removal cases cited in the opinion.

The "rule" which is supposed to bar the relief sought by the Rock Island is referred to again, at p. 5 of the opinion, as "the rule stated above," and additional cases are cited. None of them question the fundamental rule that the decisions of a Court which has not acquired jurisdiction of the person of a citizen, in the manner prescribed by law, is a nullity.

Jones vs. Andrews, 10 Wall. 327, cited at p. 5, to the proposition that "the District Court obviously had jurisdiction to determine in the first instance whether the Rock Island had entered a general appearance" was an appeal by Jones, the plaintiff below, from a decree dismissing his bill against Andrews "for want